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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1242

HAROLD NEBENZAL, PETITIONER

v.

LEONARD VONB. SUTTON,* ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court is unreported. The opinion of the court of appeals (Pet. App. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. A timely petition for rehearing was denied on January 23, 1969. The petition for a writ of certiorari was filed on April 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* Mr. Sutton is the present Chairman of the Foreign Claims Settlement Commission, and is therefore named pursuant to Rule 48(3) of the Rules of this Court.

QUESTION PRESENTED

Whether the court of appeals correctly held that the action of the Foreign Claims Settlement Commission in certifying petitioner's award to the Secretary of the Treasury for non-priority payment is not subject to judicial review.

STATUTES INVOLVED

The War Claims Act of 1948, as amended (50 U.S.C. App. 2001 *et seq.*), provides in pertinent part:

> Sec. 2010:
>
> The action of the Commission in allowing or denying any claim under this title * * * shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise * * *.
>
> Sec. 2017a. Claims authorized.
>
> The Commission is directed to receive and to determine according to the provisions of this title * * * the validity and amount of claims of nationals of the United States for—
>
> (a) loss or destruction of, or physical damage to, property located in * * * Germany, * * * which loss, destruction, or physical damage occurred during the period beginning September 1, 1939, and ending May 8, 1945 * * *.
>
> Sec 2017h(a):
>
> (a) The Commission shall certify to the Secretary of the Treasury, in terms of United States currency, for payment out of the War Claims

Fund each award made pursuant to section 202 [section 2017a of this Appendix].

Sec. 2017*l*:

(a) The Secretary of the Treasury shall pay out of the War Claims Fund on account of awards certified by the Commission pursuant to this title [sections 2017-2017p of this Appendix] as follows and in the following order of priority:

(1) Payment in full of awards made pursuant to section 202(d)(1) and (2) [sections 2017a(d)(1) and (2) of this Appendix], and thereafter of any award made pursuant to section 202a [section 2017a(a) of this Appendix] to any claimant certified to the Commission by the Small Business Administration as having been, on the date of loss, damage, or destruction, a small business concern within the meaning now set forth in the Small Business Act, as amended [sections 631-647 of Title 15].

(2) Thereafter, payments from time to time on account of the other awards made pursuant to section 202 [section 2017a of this Appendix] in an amount which shall be the same for each award or in the amount of the award, whichever is less. The total payment made pursuant to this paragraph on account of any award shall not exceed $10,000.

(3) Thereafter, payments from time to time on account of the unpaid balance of each remaining award * * * which shall bear to such unpaid balance the same proportion as the total amount in the War Claims Fund and available for distribution at the time such payments are made bears to the aggregate unpaid balances of all such awards. * * *

Sec. 2017n:

> To the extent they are not inconsistent with the provisions of this title * * * the following provisions of title I of this Act * * * shall apply to this title [sections 2017-2017p of this Appendix]: * * * section 11 [section 2010 of this Appendix] of title I of this Act * * *.

STATEMENT

Petitioner filed a claim with the Foreign Claims Settlement Commission for compensation for property of his father's wholly-owned German corporation, which property was destroyed during World War II. His father had died in 1961, leaving petitioner as his sole heir. The Commission awarded petitioner $412,000.

Under Section 213(a) of the War Claims Act, 50 U.S.C. App. 2017*l*(a)(1), the Secretary of the Treasury is to pay in full, on a priority basis, awards certified by the Foreign Claims Settlement Commission to claimants who qualified as small business concerns on the date of loss. In determining whether a claimant is entitled to such priority payment, the Commission initially requests the Small Business Administration to determine whether the claimant qualified as a small business concern at the time of loss. It does not, however, act mechanically upon receipt of the Administration's reply. The Commission has consistently construed its statutory authority as entitling it to make the ultimate determination regarding entitlement to priority payment. Specifically, before certifying an award to the Secretary of the Treasury for payment

on a priority basis, the Commission requires that the small business status of a claimant must have existed with regard to the very property for which compensation is sought.[1]

Accordingly, the Commission requested and received from the Small Business Administration a certification that the corporation owned by Nebenzal's father qualified as a small business concern at the time of the property loss (J.A. 3-5), and that Nebenzal himself qualified as a small business concern prior to the time he entered military service in 1941 (J.A. 7-8). The Commission made the further finding, however, that Nebenzal's small business status could not have related to the property for which he sought compensation, since his father owned the property at its destruction. Nebenzal merely inherited a claim for compensation for the loss from his father. Since Nebenzal was not a small business concern with regard to the property for which compensation was claimed, the Commission concluded that he was not entitled to priority payment under 50 U.S.C. App. 2017*l*(a)(1), and certified his award for payment on a non-priority basis.

The effect of this determination is to prevent payment in full of the award. As with all non-priority awards, Nebenzal is entitled to immedi-

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[1] This construction has been followed consistently by the Commission. See *In the Matter of the Claim of Herman Weber*, Decision No. W-16547, decided October 10, 1966 (Government Exhibit No. 5); *In the Matter of the Claim of Helen Erdos and George Wiss*, Decision No. W-17281, decided January 11, 1967 (Government Exhibit No. 6).

ate payment of $10,000 and an eventual *pro rata* share of the balance of the War Claims Fund (50 U.S.C. App. 2017*l*(a)(2)-(3)).

Despite the Commission's specific finding that he was not entitled to priority payment, Nebenzal asked the Treasury Department to pay him on a priority basis. The Treasury Department refused, since the Foreign Claims Settlement Commission had certified the award for non-priority payment (J.A. 19-20). Nebenzal then filed this suit for an order in the nature of mandamus directing the Commission to certify his award for priority payment, and directing the Secretary of the Treasury to pay the award in full. Nebenzal's theory was that, once the Small Business Administration had certified to the Foreign Claims Settlement Commission that he was a small business concern on the date of property loss, the Commission was required automatically to certify his award to the Treasury Department for priority payment. By itself determining the small business question, Nebenzal asserted, the Commission had acted outside the scope of its jurisdiction.

The district court granted the Government's motion to dismiss, holding that the decision of the Foreign Claims Settlement Commission was judicially non-reviewable and that the Court therefore lacked jurisdiction over the subject matter of the action (J.A. 24). The court of appeals affirmed. It held that the Commission's action was with respect to a question of law and fact in allowing or denying a claim, thus falling within the express language of the non-reviewability provision. 50 U.S.C. App. 2010, 2017n. The court

stated: "It would be inconsistent with the congressional grant of final authority to the Commission for the courts to compel a result different from [the Commission's] reasonable interpretation of the status of appellant's claim under the Act" (App. 5a).

ARGUMENT

Congress provided in establishing the Foreign Claims Settlement Commission that "The action of the Commission in allowing or denying any claim under this title * * * shall be final and conclusive on all questions of law and fact and not subject to review by * * * any court by mandamus or otherwise * * *."[2] This petition represents the latest in a long series of attempts

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[2] 50 U.S.C. App. 2017n. That section is part of the 1962 amendments to the War Claims Act of 1948, 50 U.S.C. App. 2001, *et seq.*, and specifically incorporated into the 1962 amendments the finality provisions contained in 50 U.S.C. App. 2010. The House Committee Report explaining this finality unequivocally confirms congressional intent to bar judicial review of the Commission's actions. H. Rep. 2035, U.S. Code Congressional and Administrative News, 87th Cong., 2d Sess., pp. 3834-3835. A similar provision is contained in the International Claims Settlement Act of 1949, which the Foreign Claims Settlement Commission administers. 22 U.S.C. 1641(m). The legislative history of that section also reflects the clear Congressional purpose to accord unqualified finality to the decisions of the Commission. The committee reports in both Houses specifically noted the finality provisions (S. Rep. 800, 81st Cong., 1st Sess., pp. 5-6; H. Rep. 770, 81st Cong., 1st Sess., pp. 6-8); the minority report in the House took specific exception to those provisions (H. Rep. 770, Part 2, 81st Cong., 1st Sess., p. 2); a major heading in the presentation of the legislation by its sponsors on the floor of the House was called "Finality of Awards" (95 Cong. Rec. 8840); and the House, after considerable debate, rejected

to have this Court review decisions of the courts of appeals and the Court of Claims applying that provision. *Tillman* v. *United States*, 320 F. 2d 396 (Ct. Cl.), certiorari denied, 377 U.S. 904; *Tillman* v. *Anderson*, No. 15,254, decided Oct. 30, 1959 (C.A.D.C.), certiorari denied, 362 U.S. 903; *First National City Bank of New York* v. *Gillilland*, 257 F. 2d 223 (C.A. D.C.), certiorari denied, 358 U.S. 837; *American and European Agencies* v. *Gillilland*, 247 F. 2d 95 (C.A. D.C.), certiorari denied, 355 U.S. 884; *Haas* v. *Humphry*, 246 F. 2d 682 (C.A.D.C.), certiorari denied, *sub nom Haas* v. *Anderson*, 355 U.S. 854; *Dayton* v. *Gillilland*, 242 F. 2d 227 (C.A.D.C.), certiorari denied, 355 U.S. 813; *De Vegvar* v. *Gillilland*, 228 F. 2d 640 (C.A.D.C.), certiorari denied, 350 U.S. 994. In at least three of those cases, the claimant attempted to avoid the effect of the finality provision by characterizing the Commission's action as having been in excess of its authority or without its proper jurisdiction—just as petitioner does here. In each instance the attempt proved unsuccessful. *First National City Bank of New York* v. *Gillilland, supra; De Vigvar* v.

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an amendment by Congressman Keating, which would have provided judicial review (95 Cong. Rec. 8853-8855). See also 95 Cong. Rec. 8845, 8847.

Certainly in the absence of any claim of denial of a constitutional right thereby, the constitutional power of Congress to deny judicial review of the Commission's action cannot be questioned. Compare *Ludecke* v. *Watkins*, 335 U.S. 160; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Z. and F. Assets Corp.* v. *Hull*, 311 U.S. 470; *United States* v. *Babcock*, 250 U.S. 328.

Gillilland, supra; American and European Agencies v. *Gillilland, supra.*

Petitioner's argument based on this Court's decision in *Social Security Board* v. *Nierotko*, 327 U.S. 358, was considered and rejected in *First National City Bank of New York* v. *Gillilland, supra.* There, the court noted that *Social Security Board* v. *Nierotko, supra,* did not involve a specific non-reviewability provision.[3] Moreover, the court noted that the allegedly unauthorized action of the Commission in denying an award to the claimant could have been expressly authorized by Congress; therefore, the fact that "its delegate with unreviewable power denies those benefits to such persons" does not state a ground for judicial review. 257 F. 2d at 226. As this Court stated in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 301, "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." Since in practical effect it determined the ultimate size of the award, as the court of appeals held (Pet. App. 5a), the Commission's "reasonable" decision of the priority question was plainly within the ambit of its responsibility to allow or deny claims.

In short, petitioner has not pointed, as indeed he cannot, to any valid reason for ignoring the express legislative objective of attaching finality to all actions the Commission takes in connection with the allowance or disallowance of claims filed with it, in order to

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[3] *Leedom* v. *Kyne,* 358 U.S. 184, relied upon by the petitioner, likewise did not involve a specific statutory bar to judicial review.

assure that distribution of the available funds be promptly made.[4]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
PATRICIA S. BAPTISTE,
Attorneys.

MAY 1969

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[4] H. Rep. 2035, U.S. Code Cong. & Admin. News, 87th Cong., 2d Sess., pp. 3834-3835. Petitioner's reliance upon the decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*, 2 Weekly Law Reports 163 (1969, Part 5), is misplaced. The duties of the British Foreign Compensation Commission are not as broad as those of the Foreign Claims Settlement Commission, and the non-reviewability provision discussed in that case was wholly dissimilar from the one involved here. Indeed, in that case Lord Wiberforce noted (*id.* at 207H-208A):

> Of course, it would have been open to Parliament, or the executive, to provide that the distribution of this fund should be carried out entirely according to the unreviewable discretion of the commission or any other person, and if they had done so it would have been futile for any claimant to try to bring the court into the matter.

That, of course, is exactly what Congress has done in enacting 50 U.S.C. App. 2017n.

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